Privy Council Appeal No. 117 *of* 1925.

Mukund Dharman Bhoir and others - - - - *Appellants*

v.

Balkrishna Padmanji and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY, 1927.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD SHAW.
LORD SINHA.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by Mukund Dharman Bhoir, Govind M. Bhoir, Ramchandra M. Bhoir and Harishchandra M. Bhoir, who were defendants 1 to 4 in the suit, against a judgment and decree of the High Court of Bombay dated the 4th October, 1922.

The suit was brought by Balkrishna against the above-mentioned first four defendants, Padman, defendant number 5, who was the plaintiff's father, Malji, defendant number 6, the plaintiff's brother, Sowari, defendant number 7, the sister of Padman, and other defendants, whom it is not necessary to mention in detail. Krisnaji Ramchandra Lele and Jagunnath Raghunath Shet were added as defendants subsequently.

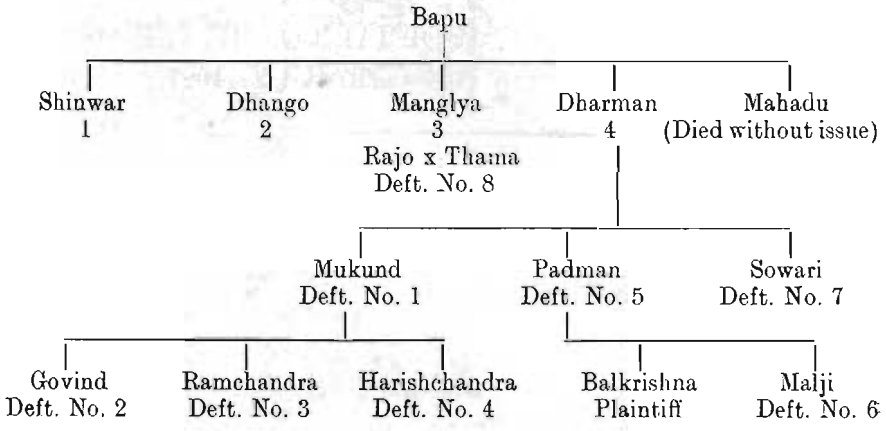
Krisnaji had purchased from the plaintiffs, after the institution of the suit, a 20-pie share of the plaintiff's share in the property which was the subject matter of the suit. Jagunnath had purchased from Padman and Malji a 40-pie share of their share in the property.

These two defendants, Krisnaji and Jagunnath, are the only respondents who have appeared on the hearing of this appeal.

The learned counsel, Sir G. Lowndes, who appeared for them, stated that in view of the fact that the only question argued before the Board was as to the amount of the shares of the plaintiff and his brother Malji, and having regard to the nature of the argument which was presented by the learned counsel for the appellants, his clients' interests were fully protected, which ever way the appeal was decided.

Sir G. Lowndes, however, intimated that he had prepared an argument upon the merits of the appeal, and was prepared to present it to the Board as *amicus curiæ* if their Lordships so desired. Accordingly, the learned counsel was heard on the merits.

The pedigree set out in the plaint shows the relationship of some of the parties hereinbefore mentioned, and is as follows :—



Padman, the defendant number 5 and father of the plaintiff, was alive when the suit was instituted ; he died during the pendency of the suit and before the learned Subordinate Judge delivered his judgment.

The suit was brought by the plaintiff for partition of the property described in Schedules A, B, and C of the plaint.

The properties were alleged to be the joint properties of a joint Hindu family which had been formed by Dharman and his two sons, Mukund and Padman, and which was governed by the Bombay School of the Mitakshara Law.

The property contained in Schedule C was alleged by the defendant Sowari to have been given to her. The suit was dismissed so far as the property described in Schedule C was concerned. The High Court on appeal affirmed such dismissal, and no point in respect thereof was raised on the hearing of this appeal.

The appeal thereof is confined to the property described in Schedules A and B.

The property in Schedule A is that which the plaintiff alleged was in the possession of Mukund, defendant number 1, and the property described in Schedule B was alleged to have been in possession of Padman, defendant number 5, the plaintiff's father.

The defence of the appellants was threefold. In the first place, it was alleged that the property was not subject to partition, because there had been a prior partition in 1891 between Dharman and Mukund on the one hand, and Padman on the

other. Secondly, it was urged that the property was not subject to partition because it was self-acquired property of Dharman and Mukund, the first defendant. Thirdly, it was urged that Padman and his two sons separated in interest by a document, which was called a release, and which was executed by Padman in the year 1907.

No question arises before their Lordships as to the first and second of the above-mentioned defences.

The learned Subordinate Judge found that there was no partition in 1891, and that the property was not the self-acquired estate of Dharman and the first defendant (Mukund), but that it was the joint family property of them and Padman and their sons.

These two findings were affirmed by the High Court on appeal, and the case was argued on behalf of the appellants before their Lordships on the assumption that these findings must be accepted.

The only question, therefore, which their Lordships have to consider and decide is the third, which relates to the document executed by Padman in 1907.

The facts, material to this point, are as follows:—

Padman apparently was an idle and vicious young man, of weak intellect; he was looked upon as a burden to his family and was regarded as incapable of assisting in the management of the family estate. Accordingly, a part of the family estate was allotted to him as a provision for his maintenance, and he had to live separately from his father and brother.

It is, however, found as a fact that Padman did not know that his father and Mukund had any property which was ancestral, and in which he had an interest. He was not admitted into the confidence of either of them, and he did not know that the property which was allotted to him was part of the joint family estate.

It appears that the father Dharman made a will in 1904. It has been found by the learned Subordinate Judge that the will was void in so far as it related to the ancestral property of the joint family, and did not affect the rights of the plaintiff or his brother Malji.

In 1907, the document, to which reference has already been made, was executed by Padman. It is not necessary to set it out in detail, as its terms have been so fully discussed in the judgments of the Courts in India.

It has been called a release.

It is really more in the nature of a series of recitals or admissions that the whole of the property was the separately acquired property of his father Dharman, that Dharman had made a will, that by virtue of the same, Mukund (defendant number 1) had become full owner of the property after his father's death; that Dharman had given Padman certain property during his lifetime, and that he had been living separately from his father and Mukund; that Mukund had given him certain additional property in consequence of his poverty; and, finally,

the document stated that Padman and his heir had no interest in the moveable and immoveable property acquired by Mukund or his father, and that Mukund was the full owner of all the property except that which had been given to Padman.

The learned Subordinate Judge held that the document was executed by Padman under the conviction that all the estate was the self acquisition of Dharman and Mukund, that he, Padman, had no interest in it by birth, and that he could not make any claim to the property, as it had been disposed of by his father's will.

He held that it was binding on Padman, who thereby released his one-sixth share in favour of Mukund, but it was not binding on his sons, viz., plaintiff and his brother Malji. He decided that the plaintiff and his brother Malji were each entitled to one-sixth of the family estate.

Both the plaintiff and the defendants 1 to 4 appealed to the High Court.

Mr. Justice Pratt held that the document of 1907 did not proceed on the footing of benefit at all, but on the basis of an eleemosynary allowance to a man who was entitled to nothing, and that the plaintiff and his brother Malji did not lose their interests in the joint family property by reason of the so-called release.

Mr. Justice Marten did not decide that the so-called release was binding on Padman, but for the purpose of his judgment the learned Judge was prepared to assume that it was so binding. The learned Judges held that the whole of the property, including that in the possession of Padman, should be thrown into hotchpot and then divided between the surviving members (according to their respective shares), and that the release could not be treated as if one-sixth was taken out and had become the separate share of Mukund and as if the other members were entitled to divide the balance only.

The result was that the High Court decreed that the defendants 1 to 4 should take one-half of the estate and that the plaintiff, his brother Malji and the alienees (viz., defendants Krisnaji and Jagunnath) should take the other half according to the shares mentioned in the judgment.

It is clear that the whole of the property mentioned in Schedule A and B must be treated as joint property of the family of which Padman and his sons were members.

Although Padman, in consequence of his habits and his incapacity, had to live separately, and although certain property was allotted to him for his maintenance, it has been found as a fact that such property was much less than what his one-third share would have been, and that there never was, in fact, any partition of the joint property before 1907.

In their Lordships' opinion the sole question is whether, by reason of the deed of 1907, Padman and his two sons were separated

in status from the joint family and whether there was at that time a partition of the joint family estate.

There is a twofold application of the word " division " in connection with a partition.

In the first place, there is separation, which means the severance of the status of jointness. That is a matter of individual volition ; and it must be shown that an intention to become divided has been clearly and unequivocally expressed, it may be by explicit declaration or by conduct.

Secondly, there is the partition or division of the joint estate, comprising the allotment of shares, which may be effected by different methods.

In their Lordships' opinion the deed of 1907 does not operate either as a separation of status or as a partition of joint family property.

The deed proceeded upon the basis that there was no joint family and no joint family property. The basis was that all the property, including that which was in Padman's possession, had been separately acquired, and that all the property except that in possession of Padman belonged to Mukund.

Further, by the deed, Padman agreed not to contest the genuineness or the contents of his father's will in consideration of the gift of certain property by Mukund.

There is no suggestion in any part of the deed that the parties were proceeding upon the basis that there was a joint family of which they were members, or that they were taking part in a division of the joint family property.

In their Lordships' opinion this disposes of the appeal, for it has now been ascertained that the property in dispute was, in fact, joint family property, that there never was a separation or division of the joint family property, and the plaintiff being a member of the joint family has an indefeasible right to demand partition.

Their Lordships are of opinion that the High Court's direction as to the division of the estate proceeded on a correct basis, and that the decree of the High Court in accordance therewith was rightly made.

They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

MUKUND DHARMAN BHOIR AND OTHERS

v.

BALKRISHNA PADMANJI AND OTHERS.

DELIVERED BY SIR LANCELOT SANDERSON.

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